No. 96-1219

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHIGAN DOCUMENT SERVICES, INC. and JAMES M. SMITH,

Petitioners,

—v.—

PRINCETON UNIVERSITY PRESS, MACMILLAN, INC., and ST. MARTIN'S PRESS, INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court review the Sixth Circuit's holding that petitioners' commercial copying and sale of respondent-publishers' copyrighted works is copyright infringement and not fair use, when petitioners compete with respondents in educational markets by selling anthologies of readings to students, which derive their value from the inclusion of substantial verbatim excerpts of respondents' copyrighted material, while refusing to seek permission from respondents or to pay the customary price for the intellectual property thereby used?

RULE 29.6 STATEMENT

Princeton University Press has no parent.

Princeton University Press has two non-wholly owned subsidiaries, California/Princeton Fulfillment Services, Inc. and University Presses of California, Columbia and Princeton, Ltd.

St. Martin's Press, Incorporated's parent is St. Martin's Enterprises, Inc.

St. Martin's Press, Incorporated has no non-wholly owned subsidiaries.

Macmillan, Inc.'s parent is Prentice-Hall, Inc., whose parent is Paramount Communications Acquisition Corp., whose parent is French Street Management, Inc., whose parent is Viacom International, Inc., whose parent is Viacom, Inc.

Macmillan, Inc. has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Authorities	iv
Counterstatement of the Case	1
1. The Parties And Their Businesses	1
2. The Six Infringements	4
3. The Licensing Market	7
Reasons for Denying the Petition	9
I. The Sixth Circuit's Fourth Factor Analysis Applied Settled Law and Presents No Issue Worthy of Review	10
II. The Court Below Properly Analyzed MDS's Use as Commercial in Nature	18
III. The Holding Below Depends on Proven Actual Market Harm, Not Any Presumption, and the Presumption Alternatively Applied Is In Any Event Consistent With Settled Law and Would Not "Virtually Eliminate" Educational Fair Use	24
IV. The Sixth Circuit's Opinion Rested On This Court's Precedents, And Presents No Occasion To Review *Kinko's*	27
Conclusion	27

TABLE OF AUTHORITIES

Cases: **Page**

Addison-Wesley Pub. Co. v. New York Univ., 1983 Copyright L. Dec. ¶ 25,544 (S.D.N.Y. 1983) 8

American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994) 13, 15, 22

Basic Books, Inc. v. Gnomon Corp., 1980 Copyright L. Dec. ¶ 25,145 (D. Conn. 1980) 8

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) 4, 7, 8, 27

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) . . . . . *passim*

Encyclopaedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982) 22

Feist Pubs. v. Rural Tel Serv. Co., 499 U.S. 340 (1991) 15

Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) 12

Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) . . . . . *passim*

Cases: **Page**

Harper & Row, Publishers, Inc. v. Tyco Copy Serv., Inc., 1981 Copyright L. Dec. ¶25,230 (D. Conn. 1981) 8

Los Angeles News Serv. v. Tullo, 973 F.2d 791 (9th Cir. 1992) 19

Macmillan Co. v. King, 223 F. 862 (D. Mass. 1914) 12, 21

Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983) 21, 22

Mazer v. Stein, 347 U.S. 201 (1954) 16

Pacific & So. Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). 19

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) . . . . . *passim*

Stewart v. Abend, 495 U.S. 207 (1990) 11, 15

Twin Peaks Prods. v. Publications Intl Ltd., 996 F.2d 1366 (2d Cir. 1993) 11

United Tel. Co. v. Johnson Pub. Co., 855 F.2d 604 (8th Cir. 1988) 11

Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962) 21

Cases: **Page**

Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *affd by an equally divided Court*, 420 U.S. 376 (1975) 14, 15

Statutes:

17 U.S.C. § 103 11

17 U.S.C. § 106 . . . . . 11, 12

17 U.S.C. § 107 . . . . . 10, 18, 23

17 U.S.C. § 502 18

Other Authorities:

H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. (1976) 22

H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966) 8, 9

H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967) 8

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) 8, 22, 23

S. Rep. No. 473, 94th Cong., 1st Sess. (1975) 8

Melville B. Nimmer, *Nimmer On Copyright* (1994) 15, 17, 19

William F. Patry, *The Fair Use Privilege In Copyright Law* (2d Ed. 1995) 20

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Princeton University Press, Macmillan, Inc. and St. Martin's Press, Incorporated respectfully request the Court to deny the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

COUNTERSTATEMENT OF THE CASE

1. **The Parties And Their Businesses.** This is a copyright infringement action between competitors in the market for educational course materials at the college level. Plaintiffs-respondents Princeton University Press, Macmillan, Inc., and St. Martin's Press, Incorporated ("the Publishers") are well-respected publishers in the business of publishing and selling nonfiction works. Princeton University Press is a not-for-profit entity with a mission of promoting learning through the publication of educational and scholarly books; the other two plaintiffs are for-profit corporations.

Defendant-petitioner Michigan Document Services, Inc. is a for-profit corporation that operates several photocopy shops, called "copyshops." Defendant-petitioner James M. Smith ("Smith") runs the business of Michigan Document Services as its president and sole stockholder. (Unless otherwise indicated, petitioners are collectively referred to as "MDS.")

There is a large, national market for writings assigned as course materials to students at colleges and universities. Publishers and copyshops both sell into that market.

Each of the Publishers, in addition to publishing works of general or widespread interest, publishes textbooks, anthologies, collections of readings, and other works specifically designed to be useful in the college classroom. Such works, the Publishers hope, will be assigned by college professors and purchased in book form by the students.

The market to which the Publishers sell is not exclusively a market for whole copies of books. Sometimes professors wish to assign, in lieu of or in addition to book-length works, one or more chapters from each of several copyrighted works.

Publishers in general fill that demand through their own published anthologies, and through licenses they sell to others to permit the publication of excerpts from their copyrighted works in anthologies, including licenses sold to copyshops like MDS. When a professor assigns a customized collection of readings, an enterprising copyshop such as MDS may choose for its own account to make copies of those excerpts and bind them together into books called "coursepacks" to be sold to the students:

> The physical production of coursepacks is typically handled by a commercial copyshop. . . . Adding a cover page and a table of contents, perhaps, the copyshop runs off as many sets as are needed, does the necessary binding, and sells the finished product to the professor's students.

(Pet. App. 3a.) Since the advent of rapid photocopying, coursepacks have become "almost as ubiquitous at American colleges and universities as the conventional textbook." (*Id.*) Indeed, MDS advertises that its coursepacks can be used to "replace a conventional textbook."[1] In sum, MDS and other copyshops are able to generate profits by virtue of the demand that exists for the educationally valuable works written and published by others.

The license fees that publishers receive for allowing excerpts from their copyrighted works to be anthologized (whether in traditional books or coursepacks) are part of the reward that copyright law provides to the Publishers for bringing educationally useful works to the marketplace. Each of the Publishers has a department that regularly processes and passes upon requests for such licenses, called a "permissions department."

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[1] JA 775 [MDS's promotional materials]; *see also* JA 3283:18 to 3283:21, 3406:1 to 3406:9 [Smith deposition]. All references to "JA" are references to the Joint Appendix on file with the Sixth Circuit.

Each of the Publishers generally favors granting licenses to coursepack publishers and generally charges a modest fee (usually shared equally with the author) for the right to copy and sell portions of its works. The Publishers sometimes grant permission at no charge, and sometimes they deny permission, for example, when a request is to copy an excerpt so large that the publisher believes that the book should be purchased instead. The Publishers' success in publishing educationally useful works is confirmed whenever their books are chosen to be excerpted by others for sale to students. Thus, this case is *not* about authorized coursepacks. This case is only about *unauthorized* coursepacks made without permission and without payment of the customary license fees to the copyright holders.

Permission fees are modest in the individual case but are in the aggregate a substantial source of income for the Publishers: Princeton University Press received $42,700 from such fees from August 1991 through July 1992 and $17,300 more through December 1992; St. Martin's Press received more than $125,000 in fiscal 1992; and Macmillan received $237,415 from April 1991 through March 1992, and $241,000 more through December 1992.[2]

As the foregoing figures reflect, the market for licenses to anthologize substantial excerpts in the course materials market is substantial and well known. MDS knew before making the copies at issue that publishers generally seek licensing fees for the kind of copying and selling involved here. As a matter of routine practice, however, MDS chooses not to seek permission from copyright holders, and not to pay required licensing fees, when it makes and sells coursepacks to students.

MDS below designated an expert in the copyshop industry, William Ternes, whose testimony showed that MDS is a

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[2] *See* Pet. App. 11a, 120a [licensing income stream demonstrated by the Publishers]; JA 1004 ¶ 5 [Fisher declaration]; JA 970 ¶ 5 [Mullen declaration]; JA 956 ¶ 4 [Van Rheinberg declaration].

maverick in the industry. Mr. Ternes owns an Ann Arbor copyshop that seeks permission for the copyrighted materials in its coursepacks, and he testified that of the ten coursepack sellers in Ann Arbor, where the copying in suit occurred, MDS is the *only one* he knows of that does not obtain permission or pay license fees for copyrighted material.[3]

The Sixth Circuit accordingly observed on the undisputed record that "most of the copyshops that compete with MDS in the sale of coursepacks pay permission fees for the privilege of duplicating and selling excerpts from copyrighted works." (Pet. App. 11a.)

MDS devised an aggressive marketing strategy to outsell its competitors after the decision in *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), which granted injunctive relief and damages to publishers that had sued a copyshop chain, like MDS, engaging in large-scale copyright infringement in the course materials market. Using disdain for *Kinko's* and copyright law as its selling point, MDS, "to try and solicit new business," sent out thousands of letters to professors promising not to seek permission for coursepack excerpts so as to save the time and expense of seeking and paying for permission from the copyright holders. MDS boasted that while its competitors were complying with the copyright law, its unauthorized coursepacks meant "No Delays Waiting for Permission" and "No Excessive Royalty Demands."[4] In response, this lawsuit began on February 28, 1992.

2. **The Six Infringements.** The Publishers' complaint challenged three books manufactured and sold by MDS. Those three books included excerpts from six works in which the Publishers own the copyrights. The Publishers' works in question, and the

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[3] JA 2938:25 to 2939:4; 2942:21 to 2945:3 [Ternes deposition].

[4] *See* Pet App. 4a; JA 735 [MDS's promotional materials]; JA 3440:17 to 3441:22, 3477:25 to 3478:6, 3479:4 to 3479:12 [Smith deposition]; JA 737-738 [MDS's letter to professors].

statistics on the magnitude of the excerpts copied, are as follows: Nancy J. Weiss, *Farewell to the Party of Lincoln: Black Politics in the Age of FDR* (Princeton University Press) (95 pages copied, representing 30 percent of the entire book); Walter Lippmann, *Public Opinion* (Macmillan) (45 pages copied, representing 18 percent of the whole); Robert E. Lane, *Political Ideology: Why the American Common Man Believes What He Does* (Macmillan) (78 pages, 16 percent); Roger Brown, *Social Psychology* (Macmillan) (52 pages, 8 percent); Milton Rokeach, *The Nature of Human Values* (Macmillan) (77 pages, 18 percent) and James S. Olson and Randy Roberts, *Where the Domino Fell, America and Vietnam, 1945-1990* (St. Martin's Press) (17 pages, 5 percent). (*See* Pet. App. 5a.)

At its own risk and for its own account, MDS made and sold nearly five hundred copies of the three infringing coursepack books containing the foregoing copyrighted excerpts to college students at the University of Michigan during the Winter, 1992 semester. MDS's purpose was to profit. It did not seek permission to copy any of the excerpts, and paid no license fees.

The Publishers submitted uncontroverted evidence that, consistent with their usual practices, they would have granted permission to copy five of the six excerpts in suit for modest fees. (Permission to copy the sixth work, Macmillan's *Public Opinion* by Walter Lippman, would have been denied because the excerpt requested was large enough that Macmillan would prefer to ask students to buy the book itself, available for purchase in an inexpensive paperback edition.)

One of the coursepacks in suit was entitled *History of Vietnam Era*, an anthology of readings assigned in a course at the University of Michigan in the Winter, 1992 semester, in preference to other available collections of readings on Vietnam such as, for example, St. Martin's Press's anthology *Light at the End of the Tunnel: A Vietnam War Anthology*. MDS copied a

selection from the *Light at the End of the Tunnel* anthology in the *History of Vietnam Era* coursepack.[5]

The *History of Vietnam Era* coursepack also included a copy of a 17-page chapter taken from St. Martin's Press's work *Where The Domino Fell: America and Vietnam 1945-1990*. On December 26, 1991, a competitor of MDS's in Ann Arbor had requested permission to make 550 copies of that excerpt for inclusion in a coursepack. On January 9, 1992, St. Martin's granted permission and requested a fee of $440 (eighty cents per copy times 550 copies). The coursepack was never produced by the competitor, however, because MDS produced the coursepack instead. It made and sold hundreds of copies of the coursepack, including the excerpt from *Where The Domino Fell*, without seeking permission or paying a license fee, thus causing at least a $440 loss of revenue for St. Martin's Press.[6]

The six representative infringements in suit are but the "tip of the iceberg" of the thousands of infringements that MDS commits each semester. (Pet App. 111a.) In 1991, MDS sold multiple copies of approximately 700 different coursepack titles (and probably sold as many as 25,000 books in total), and in 1992 MDS sold multiple copies of approximately 1,000 different

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[5] JA 260.

[6] JA 971 ¶¶ 9, 11 [Mullen Declaration]. MDS says that the three coursepacks in suit would have cost students more than $700 if it had to pay the Publishers' customary royalties. (Pet. 6.) The $700 figure does not appear anywhere in the record below, where the parties did not litigate how much a coursepack would cost in total under the Publishers' usual approaches to pricing. If, however, one takes the amount that St. Martin's Press in fact requested for the excerpt from *Where the Domino Fell* (80¢ for 17 pages, or 4.7¢ per page), and assumes that the same charge applied to all of the approximately 870 pages that MDS copied in its *History of Vietnam Era* coursepack, the total royalties for the coursepack would be $40.89. (In fact, royalties for out-of-print works are smaller and so the total royalties would likely have been less.)

coursepack titles. MDS's computer lists, produced during discovery, suggest that it made multiple copies of at least 2,900 copyrighted excerpts during the Winter, 1992 term at the University of Michigan (Ann Arbor), where the copying in suit occurred. That is only one of the fourteen schools at which MDS admits it sells or has sold coursepacks. Smith publicly stated his "best guess" that, in total, MDS makes multiple copies of 10,000 to 15,000 copyrighted excerpts *each semester*.[7] This is commercial infringement on a massive scale.

3. **The Licensing Market.** Contrary to MDS's unsupported assertion that the permissions licensing market "resulted from" the 1991 district court decision in *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (*see* Pet. 6-7; 23-26), there has long been a functioning market for the licensing of substantial excerpts for inclusion in course anthologies.

The existence and scope of that market are confirmed, for example, by the very findings recited in *Kinko's*. The eight plaintiff-publishers in that case proved at trial that they already had in place permissions departments that responded to requests to copy excerpts and earned significant income therefrom. *See, e.g.*, 758 F. Supp. at 1529 ("Plaintiffs derive a significant part of their income from textbook sales *and permissions fees*") (emphasis supplied); *see also id.* at 1534 (coursepacks without permission "unfavorably impact[] upon plaintiffs' sales of their books and collections of permissions fees.")

Further confirmation that the coursepack license market was functioning well before *Kinko's* is provided by three earlier infringement actions, which were resolved by consent decrees ensuring that the plaintiffs would continue to be compensated for

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[7] JA 3339:23 to 3340:3, 3386:17 to 3386:23, 3388:22 to 3389:2, 3389:19 to 3390:20 [Smith Deposition], JA 685-707 [MDS's interrogatory response 11]; JA 817-953 [MDS's computer records of copied excerpts].

copying like that in suit here. *See Addison-Wesley Pub. Co. v. New York Univ.*, 1983 Copyright L. Dec. ¶ 25,544 (S.D.N.Y. 1983) (Macmillan Inc.'s predecessor, plaintiff); *Harper & Row, Publishers, Inc. v. Tyco Copy Serv., Inc.*, 1981 Copyright L. Dec. ¶ 25,230 (D. Conn. 1981); *Basic Books, Inc. v. Gnomon Corp.*, 1980 Copyright L. Dec. ¶ 25,145 (D. Conn. 1980) (Princeton University Press, plaintiff). Respondent St. Martin's Press, while not itself a plaintiff in those enforcement actions of the early 1980s, by that time also had a functioning permissions department earning fees from copying like that now in suit.[8]

Finally, Congress recognized the vitality of the anthology licensing market more than 30 years ago, and repeatedly noted the serious harm that results when unauthorized anthologies are made without compensation to the copyright holders and sold into the intended market of the copyright holders. As the influential 1966 House Report (part of the legislative history of the 1976 Copyright Act) put it,

> [E]ducation is the textbook publishers' only market, and . . . many authors receive their main income *from licensing reprints in anthologies and textbooks*; if an unlimited number of teachers could prepare and reproduce their own anthologies, the cumulative effect would be disastrous.

H.R. Rep. No. 2237, 89th Cong., 2d Sess. at 60 (1966) (emphasis supplied); *see also id.* at 62 ("Spontaneous copying of an isolated extract by a teacher, which may be fair use under appropriate circumstances, could turn into an infringement if the copies were . . . collected with other material from various works so as to constitute an anthology"). The committees leading the revision effort repeated those concerns in H.R. Rep. No. 83, 90th Cong., 1st Sess. at 33-34 (1967) and S. Rep. No. 473, 94th Cong., 1st Sess. at 63 (1975), and again in H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 67 (1976).

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[8] *See* JA 1344-1345.

In short, as the caselaw and legislative history consistently reflect from 1966 until the copying in suit occurred twenty five years later, the market for licenses to anthologize copyrighted works sold into the educational market is not the novel result of the district court decision in *Kinko's* in 1991, as MDS incorrectly urges.

As noted above, most coursepack publishers pay the fees publishers seek for the anthologizing of their copyrighted materials. If, however, the outcome below had been otherwise and if copyshops could without limit prepare, reproduce, and sell anthologies without paying licensing fees for the intellectual property they contain, "the cumulative effect would be disastrous" (H.R. Rep. No. 2237, above) in that it would eliminate the revenue stream to copyright holders from the permissions licensing market and thereby dampen the incentive to produce and publish copyrighted works.

REASONS FOR DENYING THE PETITION

MDS below admitted copying and selling the Publishers' works without seeking permission and raised a fair use defense. In the *en banc* opinion of the Sixth Circuit below, Judge David Nelson, writing for an 8-5 majority, rejected the fair use defense and held that MDS had infringed the Publishers' copyrights, a conclusion that the district court had reached as well.

MDS argues that the *en banc* opinion "cannot be reconciled with the plain language of the Copyright Act or this Court's copyright jurisprudence." (Pet. 9.) The *en banc* opinion, however, is in complete accord with the language of the Copyright Act, the guiding precepts of this Court, and more than 150 years of copyright and fair use jurisprudence. The decision below simply means that a commercial enterprise cannot profit by selling lengthy verbatim copies of the copyrighted works of others without the permission of the copyright holders. It thus reflects the straightforward application of well-established and unexceptionable principles to the facts at hand.

No authority cited by MDS suggests a different outcome than the one reached below. Indeed, MDS has not even taken issue with the Sixth Circuit's analysis of the third fair use factor, the "amount and substantiality" of the material copied. 17 U.S.C. § 107. That factor weighs heavily here, where MDS copied and sold as much as 30% of an entire book.

MDS has not identified any conflict in the circuits warranting review. To the contrary, the circuits are in complete accord with respect to the governing principles. MDS has also shown no conflict between the relevant decisions of this Court and the opinion below (which discusses and relies extensively on those decisions), nor any misapplication below of a properly stated rule of law. MDS has therefore failed to demonstrate any basis for review, and the petition should be denied.

We address below MDS's points in the order they are presented.

I. THE SIXTH CIRCUIT'S FOURTH FACTOR ANALYSIS APPLIED SETTLED LAW AND PRESENTS NO ISSUE WORTHY OF REVIEW.

The fair use defense, as set forth in 17 U.S.C. § 107 of the Copyright Act, requires consideration of the effect of MDS's use on "the potential market for or value of the copyrighted work," the fourth fair use factor. In following that command, the Sixth Circuit's opinion faithfully followed this Court's precedents (and similar cases in other circuits) on that issue and accordingly presents no issue worthy of this Court's attention.

The Publishers submitted uncontroverted proof of the licensing market in which publishers, and copyshops other than MDS, participate. This Court has repeatedly considered lost licensing fees as precisely the type of harm contemplated by the fourth fair use factor: "[T]he licensing of derivatives is an important economic incentive to the creation of originals. . . . The enquiry must take account not only of harm to the original but also of harm to the market for derivative works.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (quoting

Harper & Row Publishers, Inc. v. Nation Enterprises., 471 U.S. 539 (1985)).

Thus, in *Harper & Row*, 471 U.S. at 567, market harm weighing heavily against fair use was established by plaintiff's loss of income from the licensing of the right to publish brief excerpts. In *Stewart v. Abend*, 495 U.S. 207, 238 (1990), this Court denied a fair use defense to film producers who re-released a film after their license to use the underlying story had lapsed. The re-release of the film could not possibly have harmed sales of the story itself, but the Court found that "common sense" indicated that it might harm future sales of rights to the story to other filmmakers. *See also, e.g., Twin Peaks Prods. v. Publications Int'l Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993); *United Tel. Co. v. Johnson Pub. Co.*, 855 F.2d 604 (8th Cir. 1988). It is beyond dispute that fees for licensed uses of the original work are a part of the reward to copyright holders protected by the copyright laws, and the decision below did no more — and no less — than uphold that protection.

Neither of the two errors assertedly infecting the analysis below finds the slightest support in this Court's cases.

First, MDS contends that "licensing fees for the 'potential market' are relevant to market harm only when the license is for a derivative work." (Pet. 14.) This would make the question of whether MDS infringed copyrights turn on whether its coursepacks reflected enough originality to be themselves copyrightable as derivative works.

There is no logic in such a proposition, and no case cited remotely supports it. Whether or not any given coursepack could be copyrighted under 17 U.S.C. § 103(a) as a "derivative work" is wholly irrelevant. The exclusive right of copyright owners to make and sell copies, which is expressly conferred by 17 U.S.C. § 106, is not limited to "derivative works." No educational publisher could defend the wholesale copying of its competitor's works on the ground that it had simply copied all or part of the work (and therefore had failed to create a derivative work). No

case of which we are aware has ever excused an infringement, or failed to find fourth factor market harm, on the ground that the infringing work was not itself sufficiently original to be copyrightable as a "derivative work."

MDS argues that only fees lost from licensing derivative works are relevant because it believes that the copyright holder does not have "the right to control the copying of excerpts." (Pet. 14 n.5.) This is flatly wrong. It has long been settled that the copyright holder's § 106 exclusive right to copy may be infringed by copying less than the whole work:

> It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. . . . The entirety of the copyright is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property.

Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (Story, J.); *see also, e.g., Macmillan Co. v. King*, 223 F. 862, 866-67 (D. Mass. 1914) ("[t]he evidence can hardly be said to show that the infringing outlines have injured the sale of the book . . . [but even though] the whole book has not been thus dealt with; [] the copyright protects every substantial component part of the book, as well as the whole"). These principles have never been doubted in the 150 years since *Folsom v. Marsh*.[9]

MDS next argues that it would be "flawed and circular" to count as fourth factor market harm the Publishers' lost license fees from the infringements in suit, because that would premise market harm on the deprivation of "the very fees at issue." (Pet. 15.)

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[9] *Folsom*'s continuing vitality is shown by its repeated citation by the Court. *See, e.g., Campbell*, 510 U.S. at 585-591; *Harper & Row*, 471 U.S. at 550; *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984).

The courts, following this Court's guidance, have identified at least one sure way out of that "circularity" argument: when there is a regular revenue-producing market in existence, the copyright holder's loss of revenues from such a market is fourth factor market harm, even though the raising of a fair use defense questions the entitlement to those revenues. In *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994), for example, the issue was Texaco's photocopying of journal articles without paying the photocopy fees charged by the copyright holders. The Second Circuit (per Judge Newman, affirming the opinion of then-District Judge Leval below), distinguished between existing, functioning licensing markets like that proven to exist there (and here), and unlikely licensing markets such as the one in *Campbell* (where this Court noted that, with respect to licenses for parody, "the law recognizes no derivative market for critical works"):

> Since the Copyright Act explicitly provides that copyright holders have the "exclusive rights" to "reproduce" and "distribute copies" of their works, *see* 17 U.S.C. § 106(1) & (3), and since there currently exists a viable market for licensing these rights for individual journal articles, it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis . . . .

60 F.3d at 930-31. That is exactly the conclusion that the Court below reached here:

> Where . . . the copyright holder clearly does have an interest in exploiting a licensing market — and especially where the copyright holder has actually succeeded in doing so — "it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis." *American Geophysical*, 60 F.3d at 930. Only "traditional, reasonable, or likely to be developed markets" are to be considered in this connection, and even the availability of an existing system for collecting licensing fees will not be conclusive. *Id.* at 930-31 . . .

> Congress has implicitly suggested that licensing fees should be recognized in appropriate cases as part of the potential market for or value of the copyrighted work . . . .
>
> The approach followed by Judges Newman and Leval in the *American Geophysical* litigation is fully consistent with the Supreme Court case law. In *Harper & Row*, where there is no indication in the opinion that the challenged use caused any diminution in sales of President Ford's memoirs, the Court found harm to the market for the licensing of excerpts. The Court's reasoning — which was obviously premised on the assumption that the copyright holder was entitled to licensing fees for use of its copyrighted materials — is no more circular than that employed here. And in *Campbell*, where the Court was unwilling to conclude that the plaintiff had lost licensing revenues under the fourth statutory factor, the Court reasoned that a market for critical parody was not one "that creators of original works would in general develop or license others to develop." *Campbell*, 114 S. Ct. at 1178. The potential uses of the copyrighted works at issue in the case before us clearly include the selling of permission to reproduce portions of the works for inclusion in coursepacks — and the likelihood that publishers actually will license such reproduction is a demonstrated fact. . . .

(Pet. App. 12a-14a) (footnotes omitted).[10]

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[10] This case therefore differs fundamentally on its facts from the case on which MDS (and the dissents below) rely, *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1357 n.19 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975)(Pet. at 10), where there was no preexisting market for licensing excerpts as there is here. Professor Nimmer's treatise, which this Court has repeatedly cited with approval (*e.g.*, *Campbell*, 510 U.S. at 590; (continued...)

The Sixth Circuit's analysis on this point is wrong only if this Court in *Harper & Row* and *Stewart v. Abend* was wrong. If MDS is correct, the Court should not have considered licensing income in those cases because it was "circular" to do so. The existence of established markets from which publishers earn licensing fees, however, here as in *Harper & Row*, *Stewart v. Abend*, and *American Geophysical*, means it was quite correct to consider the lost licensing income as fourth factor harm.[11]

As the Court below recognized, the "circularity" argument could be applied, moreover, to ignore market harm whenever a fair use defense is raised:

> The defendants contend that it is circular to assume that a copyright holder is entitled to permission fees and then to measure market loss by reference to the lost fees. They

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[10](...continued)
Feist Pubs. v. Rural Tel Serv. Co., 499 U.S. 340, 345 (1991); *Stewart v. Abend*, 495 U.S. at 219; *Harper & Row*, 471 U.S. at 547), concludes that the holding in *Williams & Wilkins* was "seriously in error, with implications that might well justify its description by one of the dissenting judges as 'the Dred Scott decision of copyright law.'" 3 Melville B. Nimmer, *Nimmer On Copyright* § 13.05[E][4][c] at 13-104 (1994) (citation omitted).

[11] MDS sounds the alarm that if the decision below is not reviewed, then "courts will regard an owner's permission system as dispositive evidence of legal injury" and that this is error because under *Campbell*, "the mere *demand* for copying fees can never be dispositive as to whether owners are *entitled* to charge such fees." (Pet. 13, 16; emphasis original.) Given that the record below demonstrated, without dispute, a well-established functioning market for licenses to copy excerpts — not a "mere demand" for fees by the Publishers — and given the fact that the Sixth Circuit expressly noted that even the existence of such a market is not "conclusive" on the application of the fourth fair use factor (*see* passage reproduced above at 13-14), there is no basis in the decision below for that concern.

> argue that market harm can only be measured by lost sales of books, not permission fees. But the circularity argument proves too much. Imagine that the defendants set up a printing press and made exact reproductions — asserting that such reproductions constituted "fair use" — of a book to which they did not hold the copyright. Under the defendants' logic it would be circular for the copyright holder to argue market harm because of lost copyright revenues, since this would assume that the copyright holder had a right to such revenues.

(Pet. App. 11a.)

This Court has made clear time and time again that widespread for-profit competitive copying like that in suit would destroy the very "progress" that the Constitution (Art. 1 § 8) seeks to foster:

> [I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. . . . [A]s one commentator has noted: "If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading."

Harper & Row, 471 U.S. at 558-59.[12]

MDS is selling substantial excerpts from the Publishers' works to the Publishers' own intended readers and purchasers.

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[12] *See also Mazer v. Stein*, 347 U.S. 201, 219 (1954):

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."

That is precisely the kind of circumstance that led Professor Nimmer to warn that with the advent of new technology, "unrestricted photocopying practices could largely undercut the entire law of copyright." 3 Melville B. Nimmer, *Nimmer on Copyright*, § 13.05[E][1] at 13-225 to 13-226 (1994).

The foregoing principles were correctly applied by the Sixth Circuit below:

> "[T]o negate fair use," the Supreme Court has said, "one need only show that *if the challenged use 'should become widespread, it would adversely affect the potential market* for the copyrighted work.'" *Harper & Row*, 471 U.S. at 568, quoting *Sony*, 464 U.S. at 451 (emphasis supplied in part). Under this test, we believe, it is reasonably clear that the plaintiff publishers have succeeded in negating fair use.
>
> As noted above, most of the copyshops that compete with MDS in the sale of coursepacks pay permission fees for the privilege of duplicating and selling excerpts from copyrighted works. The three plaintiffs together have been collecting permission fees at a rate approaching $500,000 a year. If copyshops across the nation were to start doing what the defendants have been doing here, this revenue stream would shrivel and the potential value of the copyrighted works of scholarship published by the plaintiffs would be diminished accordingly.

(Pet. App. 10a-11a.) *See also Campbell*, 510 U.S. at 590 (courts must consider not only particular actions of the alleged infringer but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original").

No case that MDS cites supports ignoring the functioning nationwide market proven to exist below, or destroying, in the name of a fair use defense, a market which generates significant

income for the Publishers and incentivizes them to continue to publish educationally useful works.[13]

II. THE COURT BELOW PROPERLY ANALYZED MDS'S USE AS COMMERCIAL IN NATURE.

MDS urges that fair use law requires a court to focus only on the ultimate use to which a work will be put by customers of the alleged infringer, and to ignore any commercial aspects of the infringer's copying or distribution. It urges that review is necessary to correct the Sixth Circuit's alleged confusion of "the identity of the defendant with the identity of the use, thus shifting the fair use analysis away from the true user and dramatically restricting the congressional grant of fair use." (Pet. 16.)

MDS's bid for courts to focus solely on the ultimate aims of professors and students ignores the language of 17 U.S.C. § 107, whose first sentence defines "use" as "reproduction in copies" and demands consideration of "the use made of a work *in any particular case*." (Emphasis supplied.) The infringement sought to be redressed in *this* case is MDS's profit-seeking copying and sale, not any conduct of any professor or student, and the fair use inquiry therefore properly looks to that copying and sale, which have predominating commercial aspects that simply cannot be ignored.

Fair use analysis does not, and could not, focus exclusively on the ultimate consumer. If it did, any commercial publisher (such as any of the Publishers here, each of which publishes books "for" students as much as MDS sells coursepacks "for"

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[13] MDS argues that the majority below "approved" a "blanket injunction" that is "so grossly overbroad that it violates the First Amendment" and does not recognize that "fair use exists." (Pet. 22 at n.8.) Injunctions, of course, are routine in copyright cases and are expressly authorized by 17 U.S.C. § 502(a). The Sixth Circuit majority here, however, did not "approve" any injunction, but rather remanded so that the district court could frame an appropriate injunction. (*See* Pet. App. 25a-26a.)

students) could duplicate its competitors' works for sale into the educational market with impunity, clothed with fair use by virtue of the fact that the ultimate use would be "educational." As the majority properly noted, "if the fairness of making copies depends on what the ultimate consumer does with the copies, it is hard to see how the manufacture of pirated editions of any copyrighted work of scholarship could ever be an unfair use." (Pet. App. 8a-9a.) The majority below thus was faithful to the approach in *Harper & Row*, where the analysis focused on The Nation's commercial use, and not its readers' non-commercial interest in newsworthy materials of historical interest. *Harper & Row,* 471 U.S. at 562.

MDS's approach is unsupported by any case in this Court and has been rejected by the circuits and leading copyright commentators. MDS's suggested analysis is contrary to the settled rule that the "crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.

MDS relies on *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), but that decision permits personal copying of a television show for later viewing; it surely does not contemplate that a commercial enterprise could profit by copying the shows most widely in demand and then selling them to the public. The first use is not commercial and the second is, even though the consumer's ultimate "end use" is the same in both. *See Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 797 (9th Cir. 1992) (fair use does not necessarily permit commercial enterprises to make copies that individuals could make for their own use); *Pacific & So. Co. v. Duncan,* 744 F.2d 1490, 1496 (11th Cir. 1984) ("TV News Clips copies and distributes the broadcast for unabashedly commercial reasons despite the fact that its customers buy the tapes for personal use"), *cert. denied,* 471 U.S. 1004 (1985); 3 Melville B. Nimmer, *Nimmer On Copyright* § 13.05[A] at 13-170 (1994) (one who distributes

copyrighted material for profit is engaged in commercial use even if customers supplied with such material buy it for personal use); William F. Patry, *The Fair Use Privilege In Copyright Law* at 420 n.34 (2d Ed. 1995)(same).[14]

Judge Nelson's rejection of MDS's plea for focus on the student purchaser instead of the exploiting copyshop was soundly based on existing law and can hardly be improved on:

> It is true that the use to which the materials are put by the students who purchase the coursepacks is noncommercial in nature. But the use of the materials by the students is not the use that the publishers are challenging. What the publishers are challenging is the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits — and give itself a competitive edge over other copyshops — by declining to pay the royalties requested by the holders of the copyrights.

(Pet. App. 8a.) As Judge Nelson also noted, focusing on the student who purchases the coursepack for educational use "proposes no limiting principle [and] runs counter to the legislative history of the Copyright Act and has properly been rejected by the courts." (Pet. App. 8a-9a at n.2.) Rejecting the suggestion that, because students or teachers could allegedly make such copies for their own purposes, MDS should be able to do so as well, the *en banc* majority observed:

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[14] Nor is the relationship between a professor and MDS comparable to the relationship between a publisher and its printer: MDS is not a jobber hired to print copies for which a creator is at risk, but a copyshop business which chooses to exploit the educational market by locating near college campuses and making and selling copies of lengthy excerpts as course materials at its own risk and for its own account. MDS is not a mere passive conduit through which the learning process happens to wend its way. It is an active promoter of its products in the educational market, and it profits when it successfully exploits that market.

> Most of the copyshops with which the defendants compete have been paying permission fees, however, and we assume that these shops too can perform the copying on a more cost-effective basis than the professors or students can. This strikes us as a more significant datum than the ability of a black market copyshop to beat the do-it-yourself cost.
>
> As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt. We need not decide this question, however, for the fact is that the copying complained of here was performed on a profit-making basis by a commercial enterprise. And "[t]he courts have . . . properly rejected attempts by for-profit users to stand in the shoes of their customers making nonprofit or noncommercial uses." Patry, *Fair Use in Copyright Law*, at 420 n.34.

(Pet. App. 16a.) Far from being a questionable departure from fair use principles, the Sixth Circuit's analysis of the character of the use to be considered is consistent with the judgments of every other court to have decided a comparable case — including the four decisions holding that verbatim, substantial, copying of course materials for distribution to students is a copyright infringement and not fair use, even in the absence of a profit motive.[15]

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[15] *See Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983) (summary judgment against defendant teacher who copied eleven pages from another teacher's home economics instructional book; copying for same purpose as original "weighs against fair use"); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (no fair use where defendant teacher arranged plaintiff's original musical composition for school choirs and distributed copies); *Macmillan Co. v. King*, 223 F. 862 (D. Mass. 1914) (professor who tutored students infringed plaintiff's work by providing students with memoranda

(continued...)

The judgment below that MDS's copying is not fair use is confirmed by Congress' own view of the issue. When Congress reached the final stages of copyright revision, it remained committed to the common-sense proposition, first expressed in 1966 (above at 8), that unlicensed classroom anthologies used as pre-planned course materials (as distinguished from copying sparked by the spontaneous "teachable moment" that arises unexpectedly in the midst of a course) posed a special threat to the continued creation and publication of educationally useful works, since it would impair the incentives to create and publish that the copyright law is designed to foster. Congress incorporated into the legislative reports for the 1976 Act certain negotiated guidelines ("the Classroom Guidelines") setting forth the extent to which copying small amounts for non-profit educational purposes could be safely regarded as "fair use." The Guidelines express Congress's view on educational fair use copying. H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. (1976).[16] Notably, the Guidelines, echoing the above-cited warning that anthologizing excerpts posed special risks to copyright's

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[15](...continued)
quoting and paraphrasing sections of plaintiff's work); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (denying fair use defense asserted by non-profit educational consortium that copied plaintiff's educational films for use in schools).

[16] The Second and Ninth Circuits have held that the Classroom Guidelines, while not law, provide useful guidance in resolving fair use issues in educational copying cases. *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 919 n.5 (2d Cir. 1994); *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983). This Court has repeatedly consulted the House Report that contains the Classroom Guidelines. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 549-43 (1985); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 447, 450-51 (1984).

purposes, flatly "prohibi[t] . . . [c]opying . . . used to create . . . anthologies, compilations or collective works." H.R. Rep. No. 1476 at 69. This is yet more proof of Congress' long-standing recognition regarding the danger that unauthorized anthologies pose to the relevant markets.

Moreover, quite apart from the express "prohibition" of unauthorized anthologizing of copyrighted readings, the "safe harbor" created by the Guidelines is available only for copying far afield from the kind of copying at issue in this case, and does not protect copying of lengthy excerpts for use as pre-planned course materials. The "safe harbor" in the Guidelines extends only to non-profit copying, not copying by commercial enterprises, and even then only to excerpts of "not more than 1,000 words" when "the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission." H.R. Rep. No. 1476 at 68-71. The three coursepacks in suit fail on all of these grounds (Pet. App. 20a) and indeed would fail to pass muster no matter who prepared them and copied them. For example, the excerpts are too large (the smallest is 8,000 words) and they are not the result of the type of spontaneous inspiration that precludes seeking permission in a timely manner. They are all pre-planned course material — like textbooks — that are chosen by professors and generally assembled before the semester begins. In fact, professors often assign the same excerpts in coursepacks semester after semester.

Because the language of § 107, the congressional reports, and the decisions of this Court all make clear that there is a difference between not-for-profit copying undertaken directly by teachers or students, and for-profit copying undertaken by commercial copy mills, the Sixth Circuit was plainly correct in so holding here.[17]

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[17] MDS attaches as Appendix D copies of statements by the professors in suit. As the *en banc* majority correctly noted, (continued...)

III. THE HOLDING BELOW DEPENDS ON PROVEN ACTUAL MARKET HARM, NOT ANY PRESUMPTION, AND THE PRESUMPTION ALTERNATIVELY APPLIED IS IN ANY EVENT CONSISTENT WITH SETTLED LAW AND WOULD NOT "VIRTUALLY ELIMINATE" EDUCATIONAL FAIR USE.

In *Sony*, 464 U.S. at 451, this Court held that every commercial use is "presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." In *Campbell*, this Court reaffirmed that "the 'fact that a publication [is] commercial as opposed to nonprofit . . . tends to weigh against a finding of fair use,'" but tempered the *Sony* presumption by stating that "[n]o 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving *something beyond mere duplication for commercial purposes*." 510 U.S. at 590 (emphasis added).

MDS grossly mischaracterizes the decision below by contending that the Sixth Circuit here, as it did in *Campbell*, "employed

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[17](...continued)
however, "what seems significant to us is that none of these affidavits shows that the professor executing the affidavit would have refrained from assigning the copyrighted work if the position taken by the copyright holder had been sustained beforehand. . . . Professor Lieberman does not say . . . that he would have refrained from assigning the work if the copyshop had been required to pay a permission fee for it. . . . Professor Kinder does not say that he would have refrained from assigning the excerpt from the Lippmann book if it could not have been included in the coursepack. Neither does he say that he would have refrained from assigning any of the other works mentioned in his affidavit had he known that the defendants would be required to pay permission fees for them. . . . Professor Dawson does not say that a license was not available from the publisher of the Weiss book, and he does not say that the license fee would have deterred him from assigning the book." (Pet. App. 14a-15a.)

an irrebuttable presumption of legal harm and relied upon that presumption as a basis to find against fair use." (Pet. 21.)

In fact, this case presents no reviewable issue concerning any presumption from commercial exploitation, because the result rests independently on extensive, unrebutted proof of actual market harm to "the potential market for or value of the copyrighted work." In any event, given the facts of this case, there is an applicable presumption that attends mere duplication by a competitor.

As Judge Nelson repeatedly observed, first in dissent (Pet. App. 100a) and then for the majority *en banc* (Pet. App. 10a), this case presents no occasion for gauging the precise scope of the *Sony* presumption following *Campbell*, because the result below does not stand or fall on that presumption.[18] The Publishers' summary judgment motion did not rest on any presumption arising from the commercial nature of MDS's copying: instead, the Publishers proved (without dispute) a long-standing market for permissions to copy comparable excerpts for coursepacks, and the royalty amounts that the Publishers lost when MDS's competitors lost the opportunity to make the coursepacks, as a result of MDS's decision to exploit the Publishers' works without paying the customary price. Having proved the lost revenues that the copying in this case caused, and the existence of substantial existing revenue streams that would disappear overnight if comparable copying were permitted as fair use, the Publishers proved fourth factor harm directly.

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[18] As the *en banc* majority observed (Pet. App. 10a):

> If we are wrong about the existence of the presumption — if the challenged use is not commercial, in other words, and if the plaintiff publishers have the burden of proving an adverse effect upon either the potential market for the copyrighted work or the potential value of the work — we believe that the publishers have carried the burden of proving a diminution in potential market value.

Second, if any case involves "mere duplication for commercial purposes" (in the words of *Campbell*), it is this one. MDS's ability to reap profits simply by copying and selling excerpts from copyrighted works shows that there are profit-generating markets for the copyrighted works. When a profit-seeking competitor exploits a market for the copyrighted work and is able to profit merely by selling copies of the work into the same market it was intended for, there should be a presumption of harm. *See Campbell*, 510 U.S. at 578 ("central purpose" of first factor inquiry "is to see . . . whether the new work merely 'supersedes the objects' of the original"); *Harper & Row*, 471 U.S. at 562. Surely, for example, any of the Publishers here could properly invoke the *Sony* presumption in an infringement suit against a competing educational publisher that copied substantial excerpts from plaintiffs' works and bound them into an anthology for sale to the educational market. The copyright owner's right to relief, as against a claim of "fair use," would not depend on proof of actual lost sales. Common sense would be enough to support the proposition that when B (a commercial enterprise) copies and sells substantial excerpts of A's own works in A's intended market, market harm is likely to occur.[19]

Finally, the author of the opinion below — Judge David Nelson, whose dissenting view in *Campbell* was vindicated by this Court's reversal in that case — recognized that *Campbell* affected the *Sony* presumption and stated:

> Perhaps the presumption is weaker in the present case than it would be in other contexts. There *is* a presumption

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[19] MDS affirmatively advertises (above at 2) that its coursepacks can be used to "replace textbooks." In addition, MDS's coursepacks contain excerpts from previously published anthologies, which could have been selected for assignment in the very same courses. (*See* discussion of Vietnam anthologies, above at 5-6.) There should be little doubt that when students buy MDS's anthologies, sales of other published anthologies and textbooks are going to be affected.

> of unfairness here, nonetheless, and we are not persuaded that the defendants have rebutted it.

(Pet. App. 10a.) In short, for both of the foregoing reasons, this case is not an appropriate vehicle for exploring the scope of presumed market harm after *Campbell*.

IV. THE SIXTH CIRCUIT'S OPINION RESTED ON THIS COURT'S PRECEDENTS, AND PRESENTS NO OCCASION TO REVIEW *KINKO'S*.

MDS's final point is that review is needed of the "lone district court decision" in *Kinko's*. MDS argues that there are inconsistencies between *Kinko's* and this Court's subsequent decision in *Campbell* and that absent review, *Kinko's* will become the "law of the land in the eyes of publishers, authors, universities, students, libraries and copyshops." (Pet. 23-25.) If there are any inconsistencies between *Kinko's* and *Campbell*, however, we are confident that all will recognize this Court's precedence. MDS's dislike for a 1991 district court decision is irrelevant and provides no basis for review of *this* case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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